IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re FLANARY AND SONS TRUCKING, INC., d/b/a Fast Truck & Trailer Repair, EIN 62-1560560, Debtor.	No. 02-20553 Chapter 11 [affirmed E.D. Tenn. No. 2:04-CV-56; 04-28-04]

MEMORANDUM OPINION SUPPLEMENTING DECEMBER 4, 2003 ORAL RULING

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This chapter 11 case came before the court for hearing on December 4, 2003, upon the objection filed by the debtor Flanary & Sons Trucking, Inc. to the claim of the United States Department of Treasury/Internal Revenue Service (the "Service" or the "IRS") and the motion in limine filed by the Service. At the hearing, this court denied the Service's motion and sustained the debtor's objection to the Service's claim. Thereafter, orders reflecting these rulings were entered as to the motion and objection on December 9 and 19, 2003, respectively. This memorandum opinion supplements the remarks of the court stated into the record at the conclusion of the December 4, 2003 hearing. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(B).

I. Procedural History

In order to fully evaluate the merits of the Service's claim in this case and the validity of the debtor's objection, it is necessary to set forth the history of this case and the interactions of the debtor and the Service therein. The debtor filed for relief under chapter 11 on February 15, 2002, and shortly thereafter, on February 20, 2002, the debtor and the Service entered into an agreed order providing that the debtor would "pay all post-petition federal ... taxes ... on a timely basis." On April 10, 2002, the Service filed a proof of claim in this case, asserting that the debtor was indebted to it in the sum of $82,359.15 for unpaid FICA and FUTA taxes for certain

periods from December 31, 2000 through February 15, 2002, along with a heavy vehicle tax for the period ending July 31, 2001. The Service subsequently amended its claim on November 1, 2002, reducing the outstanding 2002 FUTA tax amount and adding heavy vehicle taxes for the period October 1, 2001 through June 30, 2002, thereby increasing the total amount of its claim to $90,076.19.

Also on November 1, 2002, the Service filed a request for payment as an administrative expense of certain IRS taxes which had accrued post-petition. According to the request, unpaid FICA taxes for certain periods of 2002 and heavy vehicle taxes for the period July 1, 2002 through June 30, 2003, totaled $27,670.41. After the request came before the court for hearing on December 3, 2002, the Service and the debtor tendered an agreed order which provided that the debtor would: (1) timely pay all quarterly installments of highway use tax while it was in bankruptcy; (2) by December 15, 2002, fully pay or request an abatement of all payroll taxes, interest, and penalty due for the quarter ending June 30, 2002; and (3) file a proposed plan of reorganization no later than January 30, 2003. The court entered this agreed order on December 5, 2002.

On January 28, 2003, the debtor filed a partial objection to the Service's proof of claim, maintaining that it did not owe the estimated FUTA claim for the tax period ending December 31, 2001 in the amount of $3,300 and that $23,681.77 rather than $31,022 was the amount of heavy

vehicle taxes owed by it for the period ending June 30, 2002. After the objection came before the court for hearing, the court by order entered March 19, 2003, granted the debtor's request that its objection to the Service's claim be withdrawn.

On May 12, 2003, the Service filed an objection to confirmation of the debtor's proposed "First Amended Plan of Reorganization." The objection stated that "[a]t the time the debtor filed its petition in bankruptcy, it was indebted to the United States for taxes owed the Internal Revenue Service in the total amount of $90,076.19 for federal tax liabilities ...." The Service requested that confirmation of the debtor's proposed plan be denied because it did not provide for payment of the Service's claim in accordance with the requirements of the Bankruptcy Code.

Subsequently, the debtor filed on June 2, 2003, a second amendment to its first amended plan, which, *inter alia*, modified the proposed treatment of the Service's claim. In response, the Service filed on June 12, 2003, a withdrawal of its objection to confirmation of the debtor's plan.

A week later, the Service "changed its mind" and notwithstanding its earlier withdrawal of its objection to the debtor's plan, filed on June 19, 2003, a new objection wherein it asserted that "at the time the debtor filed its petition in bankruptcy it was indebted to the United States in the total amount of $159,637.60 for federal tax

liabilities ....” In conjunction therewith, the Service amended its proof of claim on June 23, 2003, to allege that the sums owed by it by the debtor totaled $159,637.60. This amendment referenced for the first time a W-2 penalty for the tax period December 31, 1999, which according to the claim had been assessed June 16, 2003. Although it is not entirely clear from the attachment to the proof of claim, the W-2 penalty was apparently in the amount of $69,561.41 and had been assessed because of the debtor’s alleged failure to provide the Service with copies of its employees’ Wage and Tax Statements, commonly referred to a W-2s, for 1999.

On July 7, 2003, fourteen days after the Service’s latest amendment to its proof of claim, the debtor filed another objection to the Service’s claim asserting that it did not owe a W-2 penalty for the December 31, 1999 tax period.[1] The debtor stated in the objection that it otherwise had no objection to the balance of the Service’s claim, with the exception of a small amount which is not pertinent to this

[1]The Service’s initial response to the debtor’s objection was to move to strike the objection because it had not been served upon the Attorney General for the United States. After notice and a hearing, the court pursuant to order entered August 15, 2003, denied the motion because the debtor had filed an amended certificate evidencing service of the objection upon the Attorney General. Although the docket sheet for this case reflects that the objection to claim was again filed on August 12, 2003, the objection filed on the date is actually a copy of one filed on July 7, 2003, with the amended certificate of service attached.

memorandum opinion.[2] On July 15, 2003, the debtor filed a third amendment to its first amended plan, wherein it modified the proposed treatment of the Service's claim to add the following language:

> The Internal Revenue Service has recently amended its proof of claim to include a large penalty. The debtor disputes the amount of the penalty and the debtor's liability for the penalty. The parties agree to resolve this dispute, or to litigate the dispute through the objection to claim process.

In response to this amendment, the Service withdrew on July 21, 2003, its objection to the debtor's plan, and thereafter on July 29, 2003, the court entered an order confirming the debtor's "First Amended Plan of Reorganization" as modified by the second and third amendments.

A preliminary hearing on the debtor's objection to the Service's claim was held on August 12, 2003, at which time the matter was set over to September 23, 2003, for final hearing. At the parties' request, an order was entered September 19, 2003, continuing the hearing until December 4, 2003.

On November 20, 2003, the Service filed a motion in limine requesting that "the Court bar debtor from presenting testimony concerning mailing of the 1999 W-2 Forms without corroborating documents." The court set a hearing on the motion for December 4, 2003,

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[2]The debtor also objected to the portion of the claim in the amount of $3,300 for FUTA taxes for the period ending December 31, 2001, stating that the debtor had filed a tax return for that period, that all FUTA taxes had been paid, and that therefore, this portion of the claim should be disallowed. At the final hearing in this matter, the debtor through counsel announced that it intended to withdraw this aspect of its objection.

to be heard in conjunction with the debtor's objection to the Service's claim.

In a joint pretrial statement filed by the parties on November 25, 2003, in preparation for the final hearing, the parties stipulated the following:

> 1. By a notice of penalty charge dated June 16, 2003, the Internal Revenue Service informed debtor, Flanary & Sons Trucking, Inc., that the Service lacked record that the Forms W-2, Wage and Tax Statements, for 1999 required to be filed by 26 U.S.C. § 6051 had been filed and would charge a penalty for failure to file Forms W-2.
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> 2. The letter proposed a penalty of $69,561.41, as authorized by 26 U.S.C. § 6721(e), which consisted of 10% of the total amount of the wages required to be reported.
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> 3. The June 16, 2003, letter also gave debtor an opportunity to avoid the penalty in its entirety if it submitted the W-2 Forms to the Service within ten days of the date of the letter.
>
> 4. The letter also gave debtor an opportunity to provide an explanation by July 7, 2003, why the penalty should not be assessed.
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> 5. Debtor did not respond to the June 16, 2003, letter.
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> 6. The Service filed an amended proof of claim dated June 18, 2003, showing an assessment of a $69,561.41 penalty as an unsecured general claim.
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> 7. On June 27, 2003, debtor filed an objection to the claim.
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> 8. As grounds for its objection to claim, debtor alleges that it does not owe the penalty for 1999 because it had timely submitted the W-2 Forms in question.
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> 9. The letter dated June 16, 2003, was the Service's first notice to debtor that a penalty would be assessed under 26 U.S.C. § 6721 for failure to file information returns

required to be filed under 26 U.S.C. § 6051.

> 10. On October 3, 2003, as part of debtor's response to the United States' first request for production, debtor furnished a set of W-2 Forms for 1999, which its accountant had provided.

On December 4, 2003, prior to the hearing in this matter, the Debtor filed a Withdrawal of Stipulation, which recited:

> Debtor ... withdraws the stipulation that the Internal Revenue Service "informed" the Debtor of the assessment of a penalty for failure to file forms W-2 for the tax year 1999.
>
> The Debtor admits the authenticity of the Notice dated June 16, 2003, but disputes that the Debtor was sent the Notice or that it was sent in a way to allow the Debtor time to respond.

In their joint pretrial statement, the parties indicated that upon a hearing in this matter, the court would need to resolve the following three issues:

> (1) Did debtor timely file its W-2 Forms for 1999 with the Social Security Administration?
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> (2) If not, was debtor's failure to file its W-2 Forms for 1999, as required by 26 U.S.C. § 6051, "due to an intentional disregard of the filing requirement" within the meaning of 26 U.S.C. § 6721(e), and therefore subject to a penalty equal to 10% of the total amount of the wages required to be reported?
>
> (3) Is debtor subject to the lower penalty of $50 per unfiled information return, per 26 U.S.C. § 6721(a)?

II. The Hearing

Curtis Melvin Flanary, president of the debtor, testified that he had been involved in all aspects of managing the debtor since the

business first began in 1983. He stated that he received all incoming mail and was personally responsible for delivering all outgoing mail to the post office. Mr. Flanary testified that Paul Adams, CPA, who had been the debtor's accountant since 1986, routinely prepared the W-2 and W-3 forms for the debtor and another corporation of which Mr. Flanary was president, and that it was Mr. Flanary's practice each year to personally go to Mr. Adams' office to pick up the forms for the two corporations, put the postage on the envelopes, and then mail them. Mr. Flanary stated that he had never mailed the forms by certified mail or any other type of mailing that provided a written receipt. He also stated that he was familiar with the duty to submit IRS documents timely and knew there were penalties if documents were not submitted on time, but he had never been assessed with a penalty of this nature or near this size. Mr. Flanary testified that the debtor did not keep hard copies of the corporation's W-2 forms, although they were kept electronically by Mr. Adams.

With respect to the 1999 W-2 forms, Mr. Flanary testified that he had mailed them in January 2000; that if they had not been received by the Service, it was not due to any intentional failure on his part; that the debtor did not owe any taxes at that time; and that none of the debtor's 60 employees ever indicated to him that they had encountered problems in filing tax returns or receiving tax refunds for 1999. Mr. Flanary stated that he did not recall receiving any notice or directive

from the Service regarding the failure to file copies of the debtor's informational forms or the imposition of any penalty for such alleged failure prior to June 16, 2003. He recalled receiving the June 16 notice, but was not sure of the date he received it, and upon its receipt, took it to the debtor's attorney.

On cross-examination, Mr. Flanary admitted that he did not take any action to refile the 1999 W-2 forms when he received notice in the summer of 2003 that the forms had not been filed and that the Service was going to impose a penalty. His explanation was that he knew that they had been filed and that his employees had received their W-2s. During cross-examination, counsel for the Service directed Mr. Flanary's attention to the statement in the June 16, 2003 notice that provided, "If you believe you have reasonable cause why we shouldn't charge these penalties, you may send us an explanation and ask us to remove or reduce any of the penalties we have charged. Send us a specific explanation for each penalty you wish us to remove or reduce by July 7, 2003." When asked if it was correct that the debtor did not send any such explanation to the Service in June or July 2003, Mr. Flanary responded that his attorney contacted someone about this.

Paul Adams testified that he has been a certified public accountant since 1970 and that he has provided accounting services to the debtor since 1986, including the preparation of tax returns, payroll returns to the extent of Form 941s, 940s, W-2s, W-3s, financial statements and

as-needed business advice. He stated that he did not recall the debtor ever receiving a notice that it had not filed W-2 forms for 1999 until the June 2003 notice. Mr. Adams testified that in addition to the 1999 W-2 forms, his firm prepared and gave to Mr. Flanary for mailing Form W-3 which transmits the Form W-2s, Form 940, which is the annual FUTA return, the 941s and the state unemployment returns, along with envelopes addressed to the appropriate governmental department. Mr. Adams admitted that he had no personal knowledge as to whether the forms were actually mailed by Mr. Flanary but noted that this same procedure has been followed for years. Mr. Adams testified that in his experience, he had never seen a penalty assessed for the failure to file the informational forms although with respect to other clients, he had seen letters from the IRS asking for the forms and giving the employer a certain number of days to respond. Mr. Adams noted that with respect to one of his clients, he and the client had to send in the client's W-2 forms for 1998 and 1999 three different times before the IRS had any record that they had been received.

Paul Rhoton, the certified public accountant for the debtor in possession, testified that he was familiar in his practice with notices from the IRS stating that W-2s had not been received by the Social Security Administration, but that he had never seen a penalty issued on the first request.

Also testifying was Constance Little, a bankruptcy advisor with the

insolvency section of the IRS in its Knoxville, Tennessee office. She testified that on June 16, 2003, when she became aware that the debtor was being assessed a penalty for failure to file the 1999 W-2 forms, she contacted debtor's bankruptcy attorney and advised him of this fact and asked him to notify her when the debtor received the penalty letter from the IRS service center in Memphis. Ms. Little stated that notwithstanding this request, she never received a call or any written correspondence from the debtor or its representative regarding the assessed penalty.

Ms. Little also testified that the debtor did not file its 940 for 2001 until June 26, 2003, even though the form had been due January 31, 2002, but acknowledged that the debtor had filed for bankruptcy relief on February 12, 2003. Ms. Little also testified that the debtor filed Form 941 for the second quarter of 1999 which was due July 31, 1999, on August 11, 1999, and similarly filed Form 941 for the third quarter of 1999, 11 days late. Ms. Little testified that it was her understanding that during the course of this litigation, the debtor had given copies of the 1999 W-2 forms to the Service's attorney who had then forwarded them to the Service such that the Service was now in possession of the forms, but that the Service had never received the W-2 forms directly from the debtor or its representative.

Upon recall, Mr. Flanary testified that copies of the debtor's 1999 W-2s were provided to counsel for the Service on October 3, 2003, in

response to the Service's request for production of documents. When asked if he knew whether the W-2s were ever sent directly to the IRS after the June 16 penalty letter, Mr. Flanary responded that he obtained copies of the W-2 forms from Mr. Adams and gave them to his attorney for the Service.

Mr. Adams testified that on November 18, 2003, he sent by certified mail copies of the debtor's 1999 W-2 forms to the IRS and the Social Security Administration. Introduced into evidence pursuant to a stipulation of the parties was a letter dated November 12, 2003, from Mr. Adams to Jason Zarin, counsel for the Service, wherein a previous telephone conversation between the two gentlemen is confirmed. In the letter Mr. Adams states, "I furnished a reconstructed copy of this corporation's Form W-3 and the Forms W-2s that accompanied that document to Mr. Dean Greer the corporation's attorney and you indicated that you have copies of these documents." Mr. Adams also states in the letter, "Again in September of 2003, these documents were mailed to the Internal Revenue Service in Memphis, Tennessee in response to a document received from this Service Center that stated that the taxpayer had not filed the above documents." When asked at the hearing if it was his testimony that he had mailed the forms to the Service in September of 2003, Mr. Adams responded, "I think we did, sir," although he acknowledged on cross-examination that he had no proof that he mailed them in September as they had not been sent by certified mail.

III. Analysis

As set forth in the parties' joint pretrial statement:

> An employer is required by 26 U.S.C. § 6051 to file yearly information returns (Form W-2), which report the total income and the amount of withholding for each employee. The employer must furnish the W-2s to the Social Security Administration. 26 U.S.C. § 6051(d) & 26 C.F.R. § 31.6051-2. The filing with the Social Security Administration must be made by the end of February in the following year. 26 C.F.R. § 31.6071(a)-1(a)(3).
>
> A taxpayer who fails to timely submit the information returns is subject to a penalty of $50 per information return. 26 U.S.C. § 6721(a). If the failure to file is due to intentional disregard of the filing requirements, the penalty is the greater of $100 per return or 10% of the amount required to be reported. 26 U.S.C. § 6721(e).

In the present case, no one from the IRS nor the Social Security Administration testified as to the premise underlying the Service's claim: that the debtor failed to timely file copies of its 1999 W-2 forms with the SSA. Nonetheless, the absence of such proof is not fatal to the Service's claim because the burden of establishing filing lies with the debtor as the taxpayer. *Miller v. United States*, 784 F.2d 728, 729 (6th Cir. 1986); *Woodworth v. United States (In re Woodworth)*, 202 B.R. 641, 645 (Bankr. S.D. Fla. 1996). Furthermore, "[a] tax return is filed when it is received by the IRS." *Id*. at 644. Thus, in order to avoid the imposition of a penalty, the debtor must prove actual, timely delivery of the W-2 forms.

Under common law, "proof of the mailing of a properly addressed communication bearing proper postage raises a rebuttable presumption of

receipt in due course by the addressee." *Carroll v. Comm'r*, 71 F.3d 1228, 1229 (6th Cir. 1995). On the other hand, "[t]he Internal Revenue Code [specifically § 7502] provides that a return is deemed timely filed on the date of the postmark of the envelope or the date a receipt is issued by the Post Office for either certified or registered mail." *In re Woodworth,* 202 B.R. at 644 (citing 26 U.S.C. § 7502(a) & (c)). The circuit courts of appeals which have considered the issue disagree as to whether section 7502 repeals the common law mailbox rule such that a taxpayer can no longer establish delivery with mere proof of mailing. *Id. See also* Kathleen Bicek Bezdichek, Annotation, *Determination of Timely Filing of Tax Return, Claim, Statement, or Other Tax Document Under Internal Revenue Code § 7502*, 188 A.L.R. FED 1 (2003).

In the Sixth Circuit, as held by the court of appeals on three separate occasions, "the common law rule has no application where the IRS is involved. In this circuit, a taxpayer who sends a document to the IRS by regular mail, as opposed to registered or certified mail, does so at his peril." *Carroll*, 71 F.3d at 1229. *See also Surowka v. United States,* 909 F.2d 148 (6th Cir. 1990); *Miller*, 784 F.2d at 728. Absent mailing by registered or certified mailing, circumstantial proof of mailing is insufficient as a matter of law to establish actual filing. Because it is undisputed that the debtor in the instant case failed to mail the 1999 W-2 forms by certified or registered mail when they were sent in January 2000, the debtor did not prove actual, timely

delivery or filing of the forms.

The second issue as formulated by the parties is whether the debtor's failure to file its W-2 forms was "due to an intentional disregard of the filing requirement" within the meaning of 26 U.S.C. § 6721(e), such that the debtor is subject to a penalty equal to 10% of the total amount of the wages required to be reported. According to the Code of Federal Regulations, an intentional disregard of the filing requirement occurs when the failure to file timely was "knowing or willful," as adjudged from a consideration "of all the facts and circumstances in the particular case." 26 C.F.R. 301.6721-1(f)(2). These facts and circumstances include, but are not limited to:

> (i) Whether the failure to file timely ... is part of a pattern of conduct by the person who filed the return of repeatedly failing to file timely ...;
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> (ii) Whether correction was promptly made upon discovery of the failure;
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> (iii) Whether the filer corrects a failure to file ... within 30 days after the date of any written request from the Internal Revenue Service to file ...; and
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> (iv) Whether the amount of the information reporting penalties is less than the cost of complying with the requirement to file timely or to include correct information on an information return.

26 C.F.R. 301.6721-1(f)(3). As with respect to actual filing, the burden of proving that the debtor's failure to timely file the 1999 W-2 forms was not an intentional disregard of the filing requirements lies with the debtor. *See United States v. Quality Medical Consultants*, 214

B.R. 246, 248 (M.D. Fla. 1997).

The Service asserted in counsel's closing argument that an intentional disregard had been established by the existence of the first three factors set forth in the Code of Federal Regulations. According to the Service, the debtor has a pattern of failing to file timely returns as demonstrated not only by the 1999 W-2 forms themselves, but also by the debtor's delay from January 31, 2002 to June 26, 2003, in filing its 2001 Form 940 and the two 941 forms that were filed eleven days late in 1999. The Service also maintained that the debtor neither promptly corrected the failure to file the 1999 W-2 forms nor filed the returns within 30 days after request from the Service. The Service noted that the debtor did not submit the forms by certified mail until November 2003, five months after the filing failure was brought to the debtor's attention.

This court concludes that the facts and circumstances in this case clearly and overwhelmingly establish that the debtor's failure to timely file the 1999 W-2 forms did not result from an intentional disregard of its filing requirements. The debtor neither knowingly nor willfully failed to file the forms. To the contrary, Mr. Flanary testified that in accordance with his and the debtor's standard procedure, the forms were prepared by the debtor's CPA and mailed by the debtor. Because no notice had been received from the IRS indicating that the forms had not been filed and no employee encountered a problem with respect to his or

her tax return, the debtor corporately believed in good faith that it had satisfied the filing requirement. "When a taxpayer makes a good faith effort to comply with tax regulations, intentional disregard penalties are less likely to be upheld." *Id.* at 249.

The fact that the IRS did not timely receive the 1999 W-2 forms along with the debtor's tardiness in filing a 2001 940 Form and the eleven-day delay with respect to two 941 forms in 1999 do not establish a pattern by the debtor of failing to meet its filing obligations when these deficiencies are considered in context. First, as noted, the uncontradicted testimony was that the debtor took it filing obligations seriously, had a system in place to insure that it met its filing obligations, and believed that the W-2 forms had been filed. With respect to the 940 Form, the evidence indicated that the debtor was having financial problems at the time the return was due, did not have the money to pay the taxes due on the return, and in fact filed for chapter 11 relief less than three weeks after the return's due date. While the debtor still should have complied with its filing requirement even though it did not have the funds to pay the taxes owed, its failure to do so while inappropriate does not indicate a pattern of neglect.

As to the contention that the debtor failed to timely comply with its filing requirement after request from the Service, it must first be observed that the Service sent no such request. Rather, the first notice from the Service that the W-2 forms had not been received was a

"Notice of Penalty Charge," advising the debtor that it had been assessed a penalty of almost $70,000 and that if the debtor challenged the penalty, it should file a response by July 7, 2003. This penalty notice came three and one-half years after the filing deadline, after the debtor had been in chapter 11 for a year and a half, after the Service had filed and amended on two occasions its proof of claim without mentioning the failure or penalty, and after objections to the Service's claim and the debtor's plan of reorganization had been resolved by the parties. In light of the foregoing, it is not surprising that the debtor was skeptical of the Service's claim that the 1999 W-2 forms had not been filed and therefore, did not act as promptly as the Service would have liked. Nonetheless, the debtor did timely file a response challenging the penalty by the deadline set forth in the penalty notice when it objected on July 7, 2003, to the Service's amended proof of claim which included the penalty.

The debtor's delay thereafter in resubmitting the W-2 forms was due to the fact that the penalty assessment was being litigated in the debtor's bankruptcy case, as provided for in the debtor's confirmed plan. This litigation was quickly resolved, as the above record establishes, and there was no indication that the debtor delayed or abused the resolution process to avoid its filing obligations. To the contrary, the debtor furnished copies of the 1999 W-2 forms to counsel for the IRS on October 3, 2003, as part of debtor's response to the

Service's first request for production of documents and then again furnished copies to the Service by mailing them via certified mail in November, prior to the final hearing on this matter in December. It is clear to the court from the evidence presented in this contested matter and from the debtor's conduct in its chapter 11 case that this debtor neither knowingly nor willfully disregarded its taxpayer obligations but instead rigorously sought to insure that it had satisfied and complied with all laws and regulations.

As to the third issue set forth by the parties in the joint pretrial statement, the debtor conceded that it was subject to the lower penalty of $50 per unfiled information return, pursuant to 26 U.S.C. § 6721(a). The parties announced at the conclusion of the hearing that it was undisputed that there were 60 employee W-2 forms which had not been timely filed. Accordingly, the debtor is liable for a penalty of $3,000.

The last issue to be addressed is the Service's motion in limine, wherein the Service requested that "the Court bar debtor from presenting testimony concerning mailing of the 1999 W-2 Forms without corroborating documents" because "witness testimony alone in the absence of postmarks or certified mail receipts is not evidence of the filing of information returns." As noted above, in concluding that the debtor failed to prove that it had timely filed the W-2 forms, this court noted that the Sixth Circuit Court of Appeals has held that testimony of mailing is

insufficient as a matter of law to establish actual delivery to the Service, *i.e.*, filing. *See, e.g., Miller*, 784 F.2d at 731 ("courts have consistently rejected testimony or other evidence as proof of the actual date of mailing"). In one of the Sixth Circuit Court of Appeals' decisions on the issue, the court did state that "since Plaintiffs did not send their return registered they are precluded from setting forth circumstantial proof that their 1977 tax return was filed." *Surowka*, 909 F.2d at 150. However, no question had been raised in the *Surowka* case or either of the other two Sixth Circuit decisions regarding the admissibility of evidence. To the contrary, in all three of the cases the taxpayer was able to and did offer proof of mailing, with the court concluding, based on its interpretation of § 7052 of the Internal Revenue Code, that such evidence was insufficient to prove delivery. Thus, the Sixth Circuit's statement quoted above pertained to the sufficiency of the evidence rather than its admissibility. As such, this court does not read the Sixth Circuit decisions as authority for the proposition that this evidence must be excluded for all purposes and can not be considered by the court as to issues other than actual filing, such as the issue of whether the debtor intentionally disregarded its filing obligation.

Furthermore, the Code of Federal Regulations appears to specifically direct the court to consider the taxpayer's conduct in determining intentional disregard or lack thereof. As previously noted,

the Code provides that this determination is to be based on "**all** the facts and circumstances in the particular case." 26 C.F.R. 301.6721-1(f)(2)(emphasis supplied). Specifically mentioned as one of the facts and circumstances to be considered by the court is the whether the failure is "part of a pattern of conduct." 26 C.F.R. 301.6721-1(f)(3)(i). While a taxpayer's testimony as to the mere mailing of the return may be insufficient as a matter of law to establish actual filing, such testimony is clearly pertinent when ascertaining whether the taxpayer knowingly or willfully disregarded its filing obligations. *See United States v. Quality Medical Consultants*, 214 B.R. at 249 (court considered taxpayer's efforts to comply with tax regulations in determining that intentional disregard had not been established). Accordingly, the Service's motion in limine was properly denied.

As previously stated, orders have been entered reflecting the rulings set forth herein. The foregoing constitute findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

FILED: February 5, 2004

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE